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IN THE SUPREME COURT
OF THE UNITED STATES

ESTATE OF SALIM HENDERSON, INCAPACITATED, BY HIS MOTHER AND PLENARY GUARDIAN DONNA HENDERSON; DONNA HENDERSON, IN HER OWN RIGHT,
PETITIONERS

VS.

CITY OF PHILADELPHIA; RICHARD NEAL, COMMISSIONER; BYRON PURNELL, JR., BADGE NO. 4624; MELANIE PEOPLES-BARKSDALE, POLICE OFFICER, BADGE NO. 1846
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ABRAMSON & DENENBERG, P.C.
DAVID H. DENENBERG, ESQ.
1200 WALNUT ST., 6TH FLR.
PHILADELPHIA, PA 19107
(215) 546-1345

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QUESTIONS PRESENTED FOR REVIEW

I. Did the lower courts err in granting Summary Judgment under the "state-created danger" theory by finding as a matter of law appellants had not produced sufficient evidence that the police officers caused Salim Henderson's harm by failing to perform their obligations under the Pennsylvania State Mental Health Act?

II. Did the Third Circuit Court of Appeals err by upholding summary judgment where there were substantial, disputed, contested facts?

III. Did the Third Circuit Court of Appeals err by applying the standard set forth in Kneipp, 95 F.3d 119, 1211 (3rd Cir. 1996), to the case at bar when other circuits have applied different and less stringent requirements?

IV. Did the lower court err by finding that the Respondents were entitled to qualified immunity where a reasonable official would understand that by putting an individual in danger, increasing his or her risk of harm, or rendering him or her more vulnerable to danger would have violated that individual's Fourteenth Amendment substantive due process rights to bodily integrity?

V. Did the trial court err in granting Summary Judgment in favor of the City and the Police Commissioner finding no policy, custom or practice under Monell where the petitioners presented a report by a police liability expert that

City of Philadelphia Police Officers Purnell and Barksdale were improperly trained and engaged in a custom and/or practice of failing to follow acceptable police procedures concerning the proper handling of individuals who suffer from mental disabilities and that the City and Commissioner, who was the ultimate authority in the Philadelphia Police Department, failed to properly train officers in the correct handling of involuntary commitments under the Mental Health Act, and this failure was causally related to the harm suffered by Mr. Henderson?

LIST OF PARTIES

The Petitioner, Donna Henderson is a citizen of the City of Philadelphia and the guardian of the estate of her son, Salim Henderson, incapacitated.

The Respondents are the City of Philadelphia, Police Commissioner Richard Neal, Police Officer Melanie Peoples-Barksdale and Police Officer Byron Purnell, Jr.

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The opinions of the Court of Appeals for the Third Circuit and the District Court were not reported.

JURISDICTIONAL STATEMENT

The District Court for the Eastern District of Pennsylvania entered an Order dated July 9, 1999, granting defendants' Motion for Summary Judgement. Petitioner timely filed an appeal with the United States Court of Appeals for the Third Circuit.

The United States Court of Appeals for the Third Circuit issued an Order dated May 2, 2000, affirming the judgement of the District Court. Petitioner timely filed for Rehearing. On May 31, 2000 the Court of Appeals for the Third Circuit issued an Order denying Petitioner's Petition for Rehearing.

This Supreme Court of the United States has jurisdiction over this matter pursuant to 28 USCS §1254 (1) which allows cases in the courts of appeals to be reviewed by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgement or decree.

CONSTITUTIONAL PROVISIONS/STATUTES

42 USCS §1983 - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fourteenth Amendment - Due Process Clause

The Fourteenth Amendment to the United States Constitution provides that Petitioner is entitled to substantive due process of
law. Specifically, the Amendment provides that the State cannot deprive individuals of life, liberty, or property without due process of law. The provisions of the Fourteenth Amendment at issue impose a duty on state actors to protect citizens from private violence when the state creates a danger which results in foreseeable injury to a discrete plaintiff.

STATEMENT OF THE CASE

Petitioners filed a civil rights action under 42 U.S.C. § 1983 for the deprivation of Salim Henderson's bodily integrity under the Due Process Clause of the Fourteenth Amendment.

On July 29, 1996, Salim Henderson's mother, Donna Henderson, obtained a "302" involuntary commitment pursuant to the Pennsylvania Mental Health Procedures Act for her son. To obtain such a warrant, Mrs. Henderson had to show that Salim was "severely mentally disabled and in need of immediate treatment." A person is by definition "severely mentally disabled" when his capacity to care for himself is so lessened that he presents "a clear and present danger" to himself or others. 50 Pa.Stat. Sec. 7301(a). Salim Henderson was diagnosed with schizophrenia, was without medication and was exhibiting behavior which convinced both Mrs. Henderson and the issuing authority that he presented a clear and present danger to himself.[1] Mrs. Henderson completed the "302" commitment form and checked the section that indicated that commitment was necessary in order to prevent the reasonable probability that death, serious bodily injury or serious physical debilitation would occur.

On the aforementioned date, respondents, Officers Barksdale and Purnell, arrived at the home of Donna Henderson. They entered the home and began reviewing the "302" commitment papers. Salim Henderson came down from the second floor of the home when he heard the officer arrive. The officers instructed Salim to sit on the sofa in the living room.

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[1]While the Panel of the Third Circuit Court of Appeals questioned the validity of the 302 Commitment. The Respondents never questioned the validity of the commitment paperwork because they knew it was valid. This is a clear example of the Panel assuming the role of fact-finder and not accepting all of Petitioners uncontested facts.

The police officers admitted that the "302" commitment papers for Salim's involuntary commitment were in order and that they intended to take Salim to the appropriate mental health facility.[2] At this time, Salim expressed concern about being involuntarily committed to a mental health facility. Donna Henderson testified that she had not told her son about the involuntary commitment before this point because she was concerned about his reaction. Salim is a large individual, well over 6 feet and weighing more than 300 pounds. Mrs. Henderson was incapable of controlling him.

After indicating that he did not want to go with the officers to be committed, Salim asked the officers if he could get "something" upstairs. Mrs. Henderson immediately expressed concern to the officers that Salim might escape, and they should prevent him from going upstairs. Nevertheless, Officer Barksdale and Officer Purnell told Salim it was okay to go upstairs unsupervised. Approximately three to four minutes after allowing Salim to go upstairs unescorted, Salim

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[2].Philadelphia Police Department Directive 136 entitled, Subject: **Mentally Disturbed Persons**, directs Police Officers as follows:

B. Mentally disturbed person inside residence

1. Police personnel called to a residence, observing a person inside acting in such a violent manner, so as to constitute a danger to himself or others, shall:

a. Take individual into custody.

b. Take individual, along with relative or guardian when present, to area Catchment Center's Emergency Unit for examination.

2. Police personnel called to a residence, observing a person inside the residence reported to be mentally disturbed, but who is not acting in a manner dangerous to himself or others, shall NOT remove individual unless an application for emergency commitment (Section #302, State Commitment Form MH 738) shows the approval by the Mental Health and Mental Retardation administrator or his delegate. Verbal approval will be noted in the warrant portion of the 302 commitment by the delegate's mane and the date.

jumped from a second story window and sustained severe and permanent brain injuries. At least nine minutes had passed from the officers' arrival until their request for medical assistance.

From the moment of their arrival and receipt of the 302 commitment papers, Salim Henderson was under the custody and control of Officer Barksdale and Officer Purnell, who should have taken appropriate actions to protect him from harm. Petitioners claimed that Officers Barksdale and Purnell violated Salim Henderson's Fourteenth Amendment rights when they created a dangerous situation and failed to protect Salim which resulted in Salim jumping out of a second story window and sustaining serious and permanent injuries. Petitioners alleged that the City of Philadelphia and Commissioner Richard Neal are liable because the officers' action were the result of the City's and the Commissioner's failure to properly train the officers in the handling of individuals who suffer from mental illness and are being involuntarily committed. Petitioners further alleged that the City and Commissioner engaged in a custom and/or practice of allowing its officers to disregard acceptable police procedures concerning the proper handling of individuals suffering from mental disabilities and that this was causally related to Officers Barksdale and Purrell's actions in handling Salim Henderson's 302 involuntary commitment.

REASONS FOR GRANTING THE PETITION

This petition raises important questions of federal law, specifically the interpretation and application of the Fourteenth Amendment Due Process provisions relating to "State Created Danger" which was initially recognized by the Court in DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d (1989).

The Third Circuit's decision in the case at bar sets forth an interpretation and application of the Fourteenth Amendment which is in conflict with other Circuit's interpretation and application of the same provisions.

In the case at bar, the trial court applied the four prong test set forth in Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) and its' progeny, Kneipp v. Tedder, 95 F.3d 199, 1211 (3d Cir. 1996) and Morse v. Lower Merion School District, 132 F.3d 912 (3d Cir. 1997) (hereafter referred to as "the Kneipp test"):

(1) the harm ultimately was foreseeable and fairly direct;

(2) the state actor acted in willful disregard for the safety of the plaintiff;

(3) there existed some relationship between the state and the plaintiff; and

(4) the state actors used their authority to create an opportunity that otherwise would not have existed for the harm to occur.

The trial court held that petitioners had met the

first three prongs of the test but not the fourth. [3]

As stated above, the trial court and the Third Circuit held the Petioners to the burden of proving that the state actors used their authority to *"create an opportunity that otherwise would not have existed for the harm to occur"*. While the Fifth Circuit has not yet had cause to review and adopt the "state created danger" theory itself, they indicated in dicta that were they to be presented with such an opportunity, they too would follow the Third Circuit's interpretation of this prong of the test. Leffall v. Dallas Independent School District, 28 F.3d 521 (1994); Armijo v. Wagon Mound Pb. Schs., 159 F.3d 1253 (1998). The standard of proof requirement pertaining to this prong of the test, however, is distinct from and far more stringent than what is required in other circuits.

The First Circuit (citing an earlier Third Circuit case, D.R. v.Middle Bucks Area Voc. Tech. School, 972 F.2d 1364 (1992) subscribes to the standard that the plaintiff must only prove that the state actor affirmatively acted to "*create or exacerbate a danger*". Robbins v. Main School Administrative District, 807 F.Supp 11 (1992).

The Second Circuit requires a showing that the state actor *"assisted in creating or increased the victim's vulnerability to the danger"*. Citizens Accord, Inc. v. The Town of Rochester, 2000 WL 504132 (N.D.N.Y. 2000); Dwares v. City of New York, 985 F.2d 94 (1993). The Ninth Circuit also subscribes to this interpretation and application. See Penilla v. City of Huntington Park, 115 F.3d 707 (1997).

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[3] While the District Court found that the Petitioners had set forth sufficient facts to establish the first three prongs of the test, the Court of Appeals for the Third Circuit, sue sponte determined that Petitioners had not established the first prong - foreseeability. As argued herein, the Court of Appeals abused its discretion by reversing this factual finding made by the District Court.

The Seventh Circuit's interpretation and application is similar but not identical to the Second Circuit. The Seventh Circuit has held that a plaintiff may establish a claim under the state created danger theory if the state action *"creates or substantially contributes to the creation of a danger or renders citizens more vulnerable to a heightened danger than they otherwise would have been."* Reed v. Gardner, 986 F.2d 1122 (1993).

Importantly, the Seventh Circuit has also specifically held that there is no absolute requirement that all avenues of "self help" be restricted. Monfils v. Taylor, 165 F.3d 511 (1998). This is directly contrary to the standard imposed in the case at bar wherein the court, in determining that the Petioners had not satisfied the forth element of the test, relied upon a finding that the police officers did not intervene to remove Henderson's private source of aid, his mother, and did not restrain her ability to assist her son. (Trial Court Opinion p. 21).

The Sixth Circuit requires that the state actor *either created or increased the risk that an individual would be exposed to a "special danger"*. The court defined "special danger" as a danger which places the individual specifically at risk, as distinguished from a risk that affects the public at large. Kallstrom v. City of Columbus, 136 F.3d 1055 (1998); Sargi v. Kent City Board of Education, 70 F.3d 907 (1995). The Eleventh Circuit has similar requirements. See Mitchell v. Duval County School Board, 107 F.3d 837 (1997).

The Eighth Circuit has adopted a similar but again, not identical, standard as the Sixth Circuit. They require that the state actor must *"create a unique risk of harm to the individual that is greater than the risk faced by the general public"*. Davis v. Fulton County, 90 F.3d 1346 (1996); Wells v. Walker, 852 F.2d 371 (1988).

The Tenth Circuit hybrid version requires that

the state actors conduct *substantially increase the risk of danger to the plaintiff who must be part of an limited and specifically defined group.* Armijo v. Wagon Mound Public Schools, 159 F.3d 1253 (1998).

It is clear from the above that the Circuits are simultaneously interpreting and applying the essential elements necessary to establish a Due Process/State Created Danger case quite disparately. It is imperative, therefore, that the United States Supreme Court review the instant appeal and provide clarification for all the circuits as to the proper interpretation and application of the law so that there be consistency within the Circuits on this issue.

ARGUMENT

The Third Circuit panel found that Petitioners had not satisfied the first and fourth prongs of the state-created danger test set out in Kneipp. Specifically, the panel found that "the harm ultimately caused was not foreseeable and fairly direct" and "the state actors did not use their authority to create an opportunity that otherwise would not have existed" for the harm to occur. Kneipp, 95 F.3d at 1208; quoting, Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995). The District Court also found that the Appellees were entitled to qualified immunity and that there was insufficient evidence to support a claim against the City of Philadelphia and Commissioner Neal related to unconstitutional municipal policies and customs.

A. Foreseeability

After reviewing the record and applying the appropriate standard for summary judgment review, the District Court found that a reasonable jury could have found that the petitioners had established sufficient facts which would satisfy the first prong of the Kneipp test; that the harm ultimately caused was foreseeable and fairly direct. The trial court stated, "a reasonable jury may also conclude that Henderson's injuries were a fairly direct result of the officer's failure to control his movements because a jury could believe that the officers' presence precipitated Henderson's attempt to avoid an imminent hospitalization." (Trial Court Opinion p. 14).

The Third Circuit panel, however, disagreed with both the petitioners and the District Court and made a finding that the petitioners could not, as a matter of law, assert sufficient facts to permit the issue of foreseeability to reach the jury.

A court may render summary judgment against a party, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." Fed.R.Civ.P. 56(c). There must be no genuine issue of material fact. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). A genuine issue is one which could lead to a dispute over material facts and might affect the outcome of the case under the governing law. Anderson, 477 U.S. at 248.

The Court of Appeals erred by usurping the jury's fact finding role. The panel made factual findings adverse to the non-moving party in contradiction to Federal Rule of Civil Procedure 56 and the above cited cases. The Court of Appeal's decision precluded the issue of foreseeability from being properly considered and decided by the jury.

Moreover, the Court of Appeals improperly relied upon evidence contrary to Petitioners' proof, it relied on facts that "undercut the conclusion that Salim Henderson's suicide attempt was reasonably foreseeable" (Memorandum Opinion, pg. 11). The panel focused upon the fact that the suicide related section of the "302" commitment papers was not checked off by Mrs. Henderson. [4] The panel's conclusion failed to consider that the section of the commitment form that Mrs. Henderson checked specifically indicated that commitment was necessary in order to prevent the reasonable probability that death, **serious bodily injury** or serious physical debilitation would occur. (emphasis added)

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[4] Salim had never attempted suicide before and therefore the section of the commitment form which references prior suicide attempts would be inapplicable. Further, Respondents have never contested the validity of the "302" Commitment papers.

It is not important to the issue of foreseeability whether the officers differentiated between the potential for suicide and the potential for other types of serious bodily harm. It does not impact on foreseeability which section of the commitment papers were checked, in as much as both sections refer to serious bodily injury or harm occurring if the individual is not committed for immediate treatment.

The Court of Appeals also found that since Mrs. Henderson did not herself prevent her son from going upstairs, the officers could not have reasonably foreseen that Salim was in any danger. The panel reached this conclusion despite the fact that Mrs. Henderson specifically told the officers that Salim would jump out the window or otherwise harm himself if they permitted him to go upstairs without their escort. The Court failed to consider that once the police were on the scene and asserted their authority by instructing Salim to sit on the couch and presented with the valid commitment papers, Mrs. Henderson reasonably assumed that it was their responsibility to act to take Salim safely into custody.[5]

As stated above, ruling on contested issues of fact is not proper for an appellate court reviewing a District court's grant of Summary Judgment. That is the sole province of the jury. A reasonable jury, had they had the opportunity, could have just as easily found, as did the District Court, that the danger to Salim was foreseeable.

Petitioners further contend that the Court of Appeal's factual findings were in contradiction to the principles established in Kneipp. In Kneipp, Samantha and Joseph Kneipp were walking home in a severe state of

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[5]Salim is a very large man, who at the time, weighed over Three hundred pounds. Mrs. Henderson needed the assistance of the police to take him into custody.

intoxication. They were stopped by police while on the highway. The officers permitted Mr. Kneipp to leave. Mr. Kneipp assumed that Mrs. Kneipp was going to either be arrested or at least escorted home by the officers. However, the officers allowed Mrs. Kneipp to walk home unescorted. Mrs. Kneipp fell off in an embankment and was not found for several hours. Due to the cold weather, Mrs. Kneipp suffered hypothermia which caused anoxia and ultimately brain damage. The Third Circuit, held in Kneipp that since the officers knew that Mrs. Kneipp had been drinking, this alone was sufficient to establish foreseeability that she was more likely to fall and injure herself than someone who was not inebriated if left unescorted.

The case at bar presents far more evidence of foreseeability than that presented and found sufficient to establish foreseeability in Kneipp. In the instant case, the officers knew that Salim was a schizophrenic who had gone off his medication and was acting erratically. Officer Purnell testified that it was his understanding that a person committed under an involuntary 302 commitment pursuant to the Pennsylvania Mental Health Procedures Act had either through their words or actions indicated that they were a danger to themselves or others. Officer Purnell testified that he was aware that to allow a person who was to be involuntarily committed to be out of his sight would endanger the safety of that person and others. Moreover, Mrs. Henderson specifically told the officers that Salim might jump out the window if given the opportunity. These facts were ignored by the Panel of the Third Circuit Court of Appeals.

In finding as a matter of law that there was no foreseeability under these circumstances, the Court of Appeals has come to a conclusion directly contrary to the holding in Kneipp. It is for these reasons that the Court of Appeals holding on foreseeability cannot stand.

B. State-Created Opportunity

It is Petitioners' argument that the forth prong of the Kneipp test is not the appropriate standard by which to judge Due Process/State-Created Danger case. As outlined in the prior section, other circuits have applied less stringent tests than the one applied by the Third Circuit.

Applying these alternative tests to the facts presented in the case at bar, a reasonable jury could have found that the police, by permitting Salim, who they were aware had serious and immediate mental health problems and had told them that he did not want to be taken into custody and hospitalized, to go upstairs by himself, affirmatively acted to "*create or exacerbate a danger*" (First Circuit). Similarly, the facts would permit a reasonable jury to find that the police *"assisted in creating or increasing the victim's vulnerability to the danger*" (Second and Ninth Circuits) or that the police *created or substantially contributed to the creation of a danger that rendered Salim more vulnerable to a heightened danger than he otherwise would have been.* (Seventh Circuit).

However, even under the more stringent fourth prong of the Kneipp test, Petitioners presented sufficient facts to establish that the police used their authority to *create an opportunity that otherwise would not have existed for the harm to occur.*

Respondent officers presented themselves at the home of the Hendersons with all of the indicia and authority vested in them as police officers under state statute to take Salim into their custody for involuntarily commitment. They entered the house and immediately took control of the situation by instructing Salim to sit down where they could see him while they reviewed the "302" commitment forms. Salim told the officers that he did not want to go with them

to be committed. The officers knew that they alone had the authority as police officers with a valid "302" commitment form to require Salim to come with them whether he wanted to or not. Salim asked the officers, and not his mother who was also present, if he had permission to go upstairs. It was the officers who granted that permission, not Mrs. Henderson. Clearly, Salim believed that the officers had authority and control over his movement. Furthermore, a jury could easily find that Mrs. Henderson reasonably believed that it was the officers' responsibility to follow Salim upstairs to ensure his safety in that they were in apparent charge of the scene and not her. This is evidenced by the fact that Mrs. Henderson specifically asked the officers to prevent her son from going upstairs by himself. Thus, there was clear, deliberate exercise of state authority by the Officers which created the danger.

In Kneipp the Court found that by leaving Mrs. Kneipp intoxicated on the highway, in the cold, the officers used their authority to create an opportunity that otherwise would not have existed for her to harm herself. The case at bar is factually similar, yet again, the Third Circuit made findings in the present case which are inapposite to the holding that they made in Kneipp.

In the instant action, the officers permitted Salim to go upstairs unescorted. Just as in Kneipp, the officers permitted the husband to leave and allowed Mrs. Kneipp to go home unescorted. Had the decision been left to Mrs. Henderson, a reasonable jury could find that because of Salim's size and strength, his mother was incapable of preventing him from escaping. Only the police had the authority and the ability to prevent Salim from doing so. Had the officers not expressly permitted Salim to go upstairs by himself, Salim would not have had the opportunity to jump out the second story window and harm himself. Therefore, they created and/or facilitated the opportunity which precipitated the harm.

The actions of the officers in the instant case are analogous to the officers actions in Kneipp which were found to be sufficient to establish the fourth prong of the State-Created Danger test. Thus, the lower courts erred in granting and affirming Respondents' motion for summary judgment.

C. Qualified Immunity

The doctrine of qualified immunity shields "government officials...performing discretionary functions...from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed. 2d 396 (1982). The burden to show immunity is on the state actor. Stoneking v. Bradford Area Sch. Dist., 882 F.2d 726 (3d Cir. 1989), Cert. Denied, 493 U.S. 1044, 10 S.Ct. 840, 107 L.Ed 2d 835 (1990). Reasonableness is measured by an objective standard. Stoneking, 882 F.2d at 726.

The trial court held that the state-created danger theory was not clearly established in July of 1996 when Salim Henderson jumped from the second story window and therefore respondents were entitled to qualified immunity. However, the DeJoseph Court, 953 F.Supp 602 (E.D.P.A 1997), went through a lengthy history of the state-created danger doctrine and held as follows:

> After my further examination of the Third Circuit's decision in Brown and D.R. two pre-September 22, 1993 cases, interpretations of the state-created danger doctrine from those two Third Circuit cases by my colleagues within the Eastern District of Pa., and the multitude of other circuits in District Courts that recognize the state-created danger

> doctrine, both pre DeShaney and pre-September 22, 1993, I believe that a reasonable official would understand that by putting an individual in danger, increasing his or her risk of harm, or rendering him or her more vulnerable to danger would have violated that individual's Fourteenth Amendment substantive due process rights.

DeJoseph v. City of Philadelphia, 953 F.Supp 602, 609 (E.D.P.A. 1997)

Therefore, the Respondents, Officers Purnell and Barksdale, were not entitled to qualified immunity as the state-created danger theory was clearly established and it cannot be said that these officers were performing discretionary functions.

If this Court were to determine that the State-Created Danger Theory was not clearly established, then Respondents' entitlement to qualified immunity turns upon whether their actions were objectively reasonable under the circumstances. This inquiry is "whether a reasonable person could have believed the officers' actions to be lawful in light of clearly established law and information he possessed." Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 3041, 97 L.Ed. 2d 396, 403 (1987). The Third Circuit has held that a individual's good faith belief that his/her conduct is legal is not sufficient. See Parkhurst v. Trapp, 77 F.3d 707, 712 (3d Cir. 1996). An individualized analysis must be done to determine the reasonableness of the official's actions. See Rouse v. Plantier, 182 F.3d 192, 200 (3d Cir. 1999).

The trial court decided that the respondent police officers would be granted qualified immunity, based upon a very narrow reading of the facts in this case, and those cases which had decided the qualified immunity issue in the past.

Regarding the facts of the instant case, these respondents were clearly aware of the fact that it was their obligation to take a person such as Salim into custody. As noted above, the officers were aware that a person who is involuntarily committed was a person who had a serious mental problem, which could result in his being a danger to himself or to others, and that Salim did not want to go to the mental health facility, voluntarily, but was being forced to go based upon a Court Order. The police officers had an affirmative obligation to take this person into custody, immediately, and to safely transport Salim to a mental health facility.

The Third Circuit has stated, "[T]he question of qualified immunity often cannot be resolved adequately until the dispositive facts have been presented at trial and reduced to findings." Abdul-Akbar v. Watson, 4 F.2d 195, 201 (3rd Cir. 1993); Karnes v. Skrutski, 62 F.3d 485, 491 (3d Cir. 1995)("While the qualified immunity defense is frequently determined by courts as a matter of law, a jury should decide disputed factual issues relevant to that determination."); Wiers v. Barnes, 925 F. Supp. 1079 (D.Del. 1996). Respondents' entitlement to qualified immunity would turn upon whether their actions were reasonable under the circumstances which is a jury question. Therefore, the trial court erred in deciding as a matter of law that the officers were entitled to qualified immunity.

D. MUNICIPAL POLICY AND CUSTOM

To impose §1983 liability upon the City or its Police Commissioner, Petitioners must establish that a municipal policy or custom was the proximate cause of the violation. See Kneipp, 95 F.3d at 1213; See also Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3rd. Cir. 1989). The custom or policy requirement is satisfied in three situations: (1) Where the constitutional deprivation is caused by a municipality's "formal rules or understanding...often but

not always committed to writing...that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time, Penbar v. City of Cincinnati, 475 U.S. 469, 480 (1986); (2) Where the constitutional deprivation is caused by "a deliberate choice to follow a course of action...made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question, Penbar, 476 U.S. at 483-84; and (3) Where the policy maker has failed to act affirmatively, so long as the need to take some action to control the (state actors) 'is so obvious, and the inadequacy [of the existing practice] is so likely to result in the violation of constitutional rights, that the policy maker...can reasonably been said to have been deliberately indifferent to the need'." Canton v. Harris, 489 U.S. 378, 390, 109 S.Ct. 1197, 1205, 103 LED.2d 412, 424 (1989).

Where, in the most obvious example, the policy maker sits on his hands after repeated, unlawful acts of subordinate officers, that failure 'evidences' deliberate indifference 'to the rights of [municipalities'] inhabitance'. The policy maker's toleration of the subordinates' behavior establishes a policy-in-practice just as readily attributable to the municipality as the one-act policy-in-practice described above. Canton, 489 U.S. at 389, 109 S.Ct. at 1205. Such a policy choice may be inferred even without a pattern of acts by subordinate officers, so long as the need for action by the policy maker is so obvious that the failure to act is to be deliberatly indifferent. Canton, 49 U.S. at 390 N.10, 109 S.Ct. at 1205, N.10; Kneipp, 95 F.3d at 1213 (only where a municipalities failure to train its employees...evidences a 'deliberate indifference' to the rights of its inhabitants can...a short coming be...[a] City 'policy or custom').

The record in this case contains evidence that at least two of the three types of municipal policies set forth above may have caused Salim Henderson's injuries. With respect to the liability of the City of Philadelphia and

Commissioner Neal, Petitioners' Police liability expert, R. Paul McCauley, Ph.D, found:

> The police records and the officers' testimony are contradictory and raise serious issues. The C.A.D. report indicates the dispatch of 'wagon for 302 Celine Henderson 20 b/m okay for Misericordia'. The spelling and pronunciation of 'Celine' may suggest a female but 'b/m' clearly indicates a black male. '302' means an involuntary mental health commitment and 'okay for Misericordia' means that the paper work for an involuntary commitment has been approved and available for responding officers. Yet, Officers Peoples (Barksdale) and Purnell responded on the belief that they were responding to an underlying voluntary commitment of a female, which would mean that no paper work was necessarily available. Clearly the written C.A.D. report is at odds with the testimony and report of the responding officers.
>
> Several explanations exist to address these discrepancies. First, the dispatch log does not reflect the actual language transmitted to the officers by the dispatcher. Such an inconsistency reflects improper dispatching and reporting procedures. These improper dispatching/reporting procedures are the product of PPD (Philadelphia Police Department) policies, supervision, and training of dispatchers. Second, the officers received this information from the dispatcher as reported on the C.A.D. but did not understand the meaning of the transmitted information. Third, from the officers' testimony, it is apparent that they used the term '302' to mean

> 'mental' rather than 'involuntary commitment'. The officers refer to '302 voluntary and involuntary,' when in fact there is no such thing as a voluntary 302 commitment. All 302s are involuntary. The confusion and lack of understanding apparently is the result of inadequate training by the PPD.
>
> Recognizing the frequency police officers in major cities respond to 302s, it is imperative that responding officers understand clearly the respective laws, department policies and operational procedures for handling these matters. This understanding is achieved by on-going training. Also, since the PPD requires all 302s be transported in wagons, rather than police cars, the need to train wagon drivers/first responders to 302s, such as Officers Peoples (Barksdale) and Purnell, is absolutely essential. In my opinion the failure of the PPD to train wagon drivers in 302 procedures, under these circumstances, would reflect the deliberate indifference to the rights of citizens of Philadelphia, especially those with mental illness.
>
> The practices, actions, and/or inactions of the PPD, as discussed above, were unacceptable and unreasonable police practices, (of) the PPD, through these practices, actions and/or inactions allow(ed) the danger to increase and were directly related to causing the foreseeable injuries suffered by Salim Henderson.

In light of the above, the trial court erred in holding that the Petitioners failed to demonstrate that a municipal custom or policy may have been a proximate cause of the deprivation of Salim Henderson's right to bodily

integrity. Even if the officers did not violate Salim Henderson's civil rights, the City of Philadelphia and Commissioner Neal can still be held liable for its deliberate indifference to the constitutional rights of Salim Henderson.

A municipality can be held liable under §1983 on a state-created danger theory. See Sciotto v. Marple Newtown School District, No. 98-2768, op. at 27 (E.D.Pa. Sept. 23, 1999); citing Cornlius v. Highland Lake, 880 F.2d 348 (11th Cir. 1989), reh'g denied, 887 F.2d 1093, cert. denied, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed. 2d 785 (1990). Under the state-created danger theory, a municipality can be held liable for the harm inflicted by **private actors**. See Sciotto, No. 98-2768, op. at 28; citing Kneipp v. Tedder, 95 F.3d 1199, 1204-1205 (3rd Cir. 1996). For liability to be imposed, a municipality must have ratified the unconstitutional conduct of its employees. See Sciotto, No. 98-2768, op. at 29; citing Monfils v. Taylor, 165 F.3d 511, 517 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3684 (April 28, 1999).

A municipality has ratified the unconstitutional conduct of its employees when a "series of decisions by a subordinate official manifested a custom or usage of which the supervisor must have been aware" Sciotto, No. 98-2768, op. at 29. The ratification analysis requires the establishment and the awareness of a custom or policy among the municipal policymakers. Sciotto, No. 98-2768, op. at 29 nt. 16.

In Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994), the court stated that the claims against the city and the officers are distinct claims which require different actions and mental states. 22 F.3d at 1292. Further, the court outlined the distinction that officers are liable under §1983 if their conduct "shocks the conscience". On the other hand, "the city is liable under §1983 if its policy makers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct

the pursuit in an unsafe manner and deprive the plaintiff of life or liberty." Fagan, 22 F.3d at 1292.

The Court in Fagan stated:

> A finding of municipal liability does not depend automatically or necessarily on the liability of any police officer. Even if an officer's actions caused death or injury, he can only be liable under section 1983 and the Fourteenth Amendment if his conduct "shocks the conscience. Id. (footnote omitted) The fact that the officer's conduct may not meet that standard does not negate the injury suffered by the plaintiff as a result. **If it can be shown that the plaintiff suffered that injury, which amounts to deprivation of life or liberty, because the officer was following a city policy reflecting the city policy makers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights.** The pursuing police officer is merely the causal conduit for the constitutional violation committed by the City. (emphasis added).

Fagan 22 F.3d at 1292.

Liability can be established if the plaintiff establishes that the relevant policy maker was aware of constitutional violations and failed to take corrective action or was deliberately indifferent to these violations. Simmons v. City of Philadelphia, 947 F.2d 1042, 1064 (3rd. Cir. 1991).

Under certain circumstances, deliberate indifference can be shown through the failure to train. See City of Canton, Ohio v. Harris, 489 U.S. 378 (1989). The

plaintiff must show that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need." See Canton, 489 U.S. at 390.

Dr. McCauley opined that the officers' misunderstanding of the law and procedures and the contradictions between the officers' testimony and the CAD report can be explained by improper dispatching, reporting and training procedures by the City and Commissioner Neal. The need for different training regarding voluntary and involuntary commitments ("302s") is so obvious that the trial court should have denied the Respondents' Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,
ABRAMSON & DENENBERG, P.C.

BY: David Denenberg

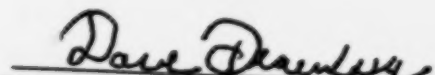
DAVID H. DENENBERG, ESQ.
1200 WALNUT STREET
6TH FLOOR
PHILADELPHIA, PA 19107
(215) 546-1345

DATED: 10·2·00

CERTIFICATION OF BAR MEMBERSHIP

It is hereby certified that the undersigned, David Denenberg, Esquire is a member of the bar of the Court of The Supreme Court of the United States.

Respectfully Submitted,



DAVID. DENENBERG, ESQUIRE
ATTORNEY FOR PETITIONERS
SALIM HENDERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ESTATE OF SALIM HENDERSON, et al.	:	CIVIL ACTION
	:	
V.	:	
	:	
CITY OF PHILADELPHIA, et al.	:	NO. 98-3861

ORDER

AND NOW, this day of July, 1999, after consideration of the defendants' motion for summary judgment, and the plaintiffs' opposition, IT IS ORDERED that Defendants' Motion for Summary Judgment is GRANTED. Judgment is entered in favor of the defendants and against the plaintiffs on Counts I, II, and III of the complaint. Count IV is dismissed without prejudice to plaintiffs' right to raise this claim in state court.

William H. Yohn, Jr., J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1579

ESTATE OF SALIM HENDERSON, INCAPACITATED, BY HIS MOTHER AND PLENARY GUARDIAN DONNA HENDERSON; DONNA HENDERSON, IN HER OWN RIGHT

V.

CITY OF PHILADELPHIA; RICHARD NEAL, COMMISSIONER; JOHN DOE, CAPTAIN; JOHN DOE, LIEUTENANT; JOHN DOE, SERGEANT; JOHN DOE#2, POLICE OFFICER; BYRON PURNELL, JR., OFFICER, BADGE NO. 4624; MELANIE PEOPLES-BARKSDALE, OFFICER, BADGE NO. 1864

Estate of Salim Henderson;
Donna Henderson,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 98-cv-03861
(Honorable William H. Yohn, Jr.)

Argued February 8, 2000

Before: SLOVITER, SCIRICA and McKEE, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on February 8, 2000. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this court that the judgment of the District Court entered July 12, 1999, be, and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

Marcia M. Waldron, Acting Clerk

DATED: 2 May 2000

UNREPORTED - NOT PRECEDENTIAL

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FOR THE THIRD CIRCUIT

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Before: SLOVITER, SCIRICA and McKEE, Circuit Judges

(Filed: May 2, 2000)

ARMANDO A. PANDOLA, JR., ESQUIRE (ARGUED)
1819 John F. Kennedy Boulevard, Suite 400
Philadelphia, Pennsylvania 19103

ALAN E. DENENBERG, ESQUIRE
Abramson & Denenberg
1200 Walnut Street, Sixth Floor
Philadelphia, Pennsylvania 19107

Attorneys for Appellant

JANE L. ISTVAN, ESQUIRE (ARGUED)
RICHARD G. FEDER, ESQUIRE
City of Philadelphia
Law Department
1515 Arch Street
Philadelphia, Pennsylvania 19102

Attorneys for Appellees

MEMORANDUM OPINION

SCIRICA, Circuit

The issue on appeal is whether the District Court erred in granting defendants' motion for summary judgment in this 42 U.S.C. § 1983 action. Plaintiff alleges the City of Philadelphia, its Police Commissioner and defendant officers violated Salim Henderson's constitutional rights both by

failing to protect him from a state-created danger and because the City has constitutionally inadequate policies, customs and training for handling mentally disturbed individuals. Because we agree with the District Court that there was no state-created danger and that no constitutional injury resulted from the City's policies, customs, or training procedures, we will affirm.[1]

I.

We have jurisdiction under 28 U.S.C. § 1291. On summary judgment, we exercise plenary review, construing all evidence and resolving all doubts raised in favor of the non-moving party. See Iberia Foods Com. v. Romeo, 150 F.3d 298, 302 (3d Cir. 1998). We must affirm a grant of summary judgment if following our review there is no issue of material fact in dispute and the defendant is entitled to judgment as a matter of law.

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[1]The District Court also granted defendants' motion for summary judgment on claims brought by the plaintiff under 42 U.S.C. §§ 1981, 1985, and 1986. As plaintiff has not appealed those decisions, we will not address them.

II.

This case stems from the tragic events of July 29, 1996. On that day, Salim Henderson's mother, Donna Henderson, sought to commit her son to the psychiatric ward at Misericordia Hospital pursuant to Pennsylvania's Mental Health Procedures Act. See 50 Pa. Stat. § 7101 et seq. In accordance with established procedures, Mrs. Henderson went to Misericorida Hospital to obtain "302 papers." Under section 7302 of the Mental Health Procedures Act, a physician or "other responsible party" can apply to the county Mental health administrator for a Warrant for Emergency Examination, which requires "any peace officer" or authorized person to bring the patient to a specified hospital for examination. 50 Pa. Stat. § 7302(a)(1). To obtain such a warrant, the applicant must show the patient is "severely mentally disabled and in need of immediate treatment." Id. A person is "severely mentally disabled" when his capacity to care for himself is so lessened that he presents a "clear and

present danger" to himself or to others. 50 Pa. Stat. § 7301(a).

The second page of the seven page commitment form requires a person seeking involuntary commitment to indicate the nature of the "clear and present danger" posed by the person sought to be committed:

> Clear and present danger to himself shall be shown by establishing that within the past 30 days;
>
> (i) the person has acted in such a manner as to evidence that he/she would be unable, without care, supervision and the continued assistance of others, to satisfy his/her need for nourishment, personal or medical care, shelter, or self - protection and safety, and that there is reasonable probability that death, serious bodily injury or serious physical debilitation would ensue within 30 days unless adequate treatment were afforded under the act; or
>
> (ii) the person has attempted suicide and that there is a reasonable probability of suicide unless adequate treatment is afforded under this act. For the purpose of this subsection, a clear and present danger may be demonstrated by the proof that the person has made threats to commit suicide and

has committed acts which are in furtherance of the threat to commit suicide; or

(iii) the person has substantially mutilated himself/herself or attempted to mutilate himself/herself substantially and that there is reasonable probability or [sic] mutilation unless adequate treatment is afforded under this act. For the purpose of this subsection, a clear and present danger shall be established by proof that the person has made threats to commit mutilation and has committed acts which are in furtherance of the threat to commit mutilation.

On July 29, 1996, Mrs. Henderson checked the first box,[2] indicating that Salim Henderson was a clear and present danger to himself because he had "acted in such a manner as to evidence that he would be unable . . . to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety . . . "

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[2]According to her deposition testimony, Mrs. Henderson provided the requisite information and the forms were filled out by a Misericordia Hospital employee. For purposes of simplicity and because Mrs. Henderson signed the forms as the applicant, we will discuss the forms as if they had been filled out personally by Mrs. Henderson.

In response to the commitment form' request for a description of the behavior providing the basis for her belief, Mrs. Henderson wrote:

> My son Salim Henderson has been throwing up out of his 2nd floor bedroom window. He is also peeing out the window. He overeats and then induces the vomiting. He was discharged from Chester Fairmount @ the beginning of July. He refuses to keep any appt. @ Horizon Hse. and he has been without medication since his discharge. He's smoking and leaves the cigars lit on paper towels, throws them around the house lit + smokes in bed also. He leaves the door to the outside open at night after we go to bed. If I ask him a question he turns around and says "Who are you? - I don't know you." He draws on the walls + then talks to the pictures he draws. He walks around the house naked.

Mrs. Henderson then completed the form by requesting that "t]he County Administrator issue a warrant authorizing a policeman or someone representing the County Administrator to take the patient to a facility for examination and treatment."

After filling out the 302 papers, Mrs. Henderson returned home and called the police to come pick up her son.

Several hours later, Philadelphia Police Officers Melanie Peoples-Barksdale and Byron Purnell arrived at the Henderson home. The officers believed they had been called to take a female, who was seeking voluntary commitment, to the hospital. Mrs. Henderson allowed the police into her house, informed them that she was committing her son, and handed them the 302 papers.

At the time of the police officer's arrival, Salim Henderson was on the second floor of the house. He subsequently came downstairs and sat by his mother and the officers and was informed the officers were there to take him to Misericordia Hospital. Salim Henderson stated he did not want to go to the hospital. He then got up, declared he needed to get something and went upstairs. Neither the officers nor Mrs. Henderson made any effort to stop Salim Henderson from going upstairs. At that point, Mrs. Henderson expressed no fears for her son's safety. Once Salim Henderson was upstairs and "out of earshot," Mrs.

Henderson informed the police she thought he might jump out a second story window. The police and Mrs. Henderson remained on the first floor reviewing the 302 papers[3] and did not go upstairs until they heard the sound of Salim Henderson's body hitting the ground outside the house. Salim Henderson suffered severe and permanent head injuries from the fall.

According to Mrs. Henderson's estimation, three to four minutes transpired between her statement that her son might jump and the time he did jump. According to police communication logs, from the time the officers arrived at the Henderson home to the time Salim Henderson jumped from his bedroom window was approximately seven to nine minutes.

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[3]The 302 papers provided to the defendant officers are not free of ambiguity. As noted, Mrs. Henderson had requested the county administrator issue a warrant to authorize the involuntary commitment of her son. The line on which the "County Administrator or his/her representative" was supposed to sign the warrant was blank. The top of the form carried the handwritten annotation "Verbally approved Lorraine Daughtry 7/29/96 11:51 am."

III.

Plaintiff brought suit under 28 U.S.C. § 1983 alleging the defendant officers violated Salim Henderson's constitutional rights by failing to protect him from a dangerous situation they had helped create.[4] Plaintiff also sued the City of Philadelphia and then-Philadelphia Police Commissioner Richard Neal alleging the City's customs and policies of providing inadequate training and supervision to officers undertaking involuntary commitments resulted in Henderson's constitutional injury.

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[4]Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

A.

In addition to arguing no constitutional violation occurred, the defendant officers assert a defense of qualified immunity. Because qualified immunity turns on whether a constitutional right was clearly established, we first must decide whether plaintiff has alleged a constitutional injury. See Conn v. Gabbert, 119 S. Ct. 1292, 1295 (1999) ("[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all . . ."); Miller v. City of Philadelphia, 174 F.3d 368, 374 (3d Cir. 1999) ("The proper approach ... is to ascertain whether a constitutional violation has been alleged before determining if qualified immunity is available."). If there has been no constitutional violation the resolution of qualified immunity is self-evident. Whether there is an underlying constitutional violation also will help clarify municipal liability for if there is no violation, there can be no municipal liability. Cf. City Heller, 475 U.S. 796, 799 (1986) (per curiam) ("If a person

has suffered no constitutional injury at the hands of the individual police officers, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."). See also Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995) (noting that section 1983 provides only a remedy and does not create substantive rights).[5]

B.

The constitutional violation alleged by plaintiff is a violation of his substantive due process rights. It is well established that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 197 (1989). Plaintiff

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[5]This is not to say that there must be actionable conduct by the defendant officers for the City or former Commissioner Neal to be held liable. See Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994) ("A finding of municipal liability does not depend automatically or necessarily on the liability of any police officer."). There must, however, be a constitutional injury for the municipality to be held liable under 28 U.S.C. § 1983.

attempts to fall within the state-created danger exception to DeShaney arguing the defendant officers willfully disregarded Salim Henderson's safety after placing him in a dangerous situation he would not have otherwise faced. See Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996) (adopting "state-created danger" theory).

> Plaintiff must establish four elements to assert a "state-created danger" claim:
>
> (1) the harm ultimately caused was foreseeable and fairly direct;
> (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their auth to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Id. at 1208 (quoting Mark, 51 F.3d at 1152).

The District Court found the first three prongs satisfied, but granted defendants' motion for summary judgment based on its conclusion that plaintiff had not established the fourth prong. See Estate of Salim Henderson v. City of Philadelphia, No. 98-3861, slip op. at 22 (E.D. Pa.

July 12, 1999). Alternatively, the District Court concluded the defendant officers were entitled to qualified immunity. See id. at 26. The District Court also concluded Philadelphia and its police commissioner could not be liable because the city's policies had not caused a constitutional injury. See id. at 37.

1.

The District Court found the first Kneipp prong satisfied concluding that

> a reasonable jury could find that the harm Henderson suffered was a foreseeable and fairly direct result of the officers' failure to control his movements. Accepting the plaintiffs' version of the facts, the officers were presented with valid 302 papers for Henderson which indicated that Henderson was a danger to himself, witnessed a conversation between Henderson and his mother during which Henderson stated he did not want to go to the hospital, allowed Henderson to go upstairs alone, were warned by his mother that he may jump out a window, and did nothing to control Henderson's actions for three to four minutes following the warning.

Id. at 13. The District Court's recitation of the facts available to the defendant officers omits important elements that cut

against the reasonable foreseeability of the harm that befell Salim Henderson. Most importantly, the commitment papers presented to the defendant officers made no mention that Salim Henderson might be suicidal even though the forms provided ample opportunity for such comments. The nature of the danger Salim Henderson posed to himself, as described in the 302 papers, did not suggest attempted suicide was reasonably foreseeable. As noted, Mrs. Henderson gave no indication of possible danger until her son had gone upstairs. Furthermore, Mrs. Henderson's response, or lack thereof, to the officers' inaction also undercuts the conclusion that Salim Henderson's suicide attempt was reasonably foreseeable. Therefore, we are not convinced that plaintiff has satisfied the first Kniepp prong. That said, however, we agree with the District Court that plaintiff cannot satisfy the fourth Kniepp prong. See discussion infra. Nonetheless, we shall also address the second and third Kniepp prongs.

Relying on Mrs. Henderson's testimony that she warned the defendant officers that her son might jump out of a second story window, the District Court concluded the defendant officers could be found to have acted with willful disregard toward Salim Henderson's safety. See id. at 15-16. Deliberate indifference or willful disregard presupposes foreseeable harm. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 910 (3d Cir. 1997) ("[T]he state's actions must evince a willingness to ignore a foreseeable danger or risk."). If the harm in question was reasonably foreseeable, it follows that a jury could reasonably conclude the defendant officers, by failing to respond to Mrs. Henderson's concerns, ignored a foreseeable danger or risk. If it was not reasonably foreseeable, then no risk was ignored.

Defendants argue both that the defendant officers were not deliberately indifferent because there was no foreseeable danger and that the proper standard for examining

Henderson's substantive due process claim is the "shocks the conscience" standard articulated in County of Sacramento v. Lewis, 523 U.S. 833 (1998). In light of Lewis and the burgeoning number of state created danger cases, the City urges us to refine the second Kneipp prong to make liability turn on a showing of deliberate indifference (or willful disregard) that shocks the conscience. Because plaintiff cannot satisfy the fourth Kniepp prong, we need not reach this issue even though we are cognizant of support for such a position in our case law and that of other Courts of Appeals. Cf. Miller, 174 F.3d at 375 ("To generate [section 1983] liability, executive action must be so ill-conceived or malicious that it 'shocks the conscience.'"); Hasenfus v. LaJeunesse, 175 F.3d 68, 73 (1st Cir. 1999) (applying Lewis "shocks the conscience" standard to state-created danger case); Radecki v. Barela, 146 F.3d 1227 (10th Cir. 1998) (same).

3.

The District Court also found the third Kniepp prong satisfied. See Estate of Henderson, slip op. at 17-18. As we explained in Kneipp, "the relationship requirement... contemplates some contact such that the plaintiff was a foreseeable victim of the defendant's acts in a tort sense." 95 F.3d at 1209 n.22. If Salim Henderson's injuries were reasonably foreseeable, it follows that he was a "foreseeable victim" of the defendant officers' inaction, if such inaction provides grounds for liability. If his injuries were not reasonably foreseeable, then this prong is not met. See discussion supra.

4.

Plaintiff argues that in light of the District Court's conclusion that "[a] reasonable fact-finder could decide that the officers' failure to control Henderson's actions, when he clearly did not want to be committed and when he was aware that the officers were there to take him to the hospital,

'precipitated or was the catalyst for' his decision to jump out of the window,'" Estate of Henderson, slip op. at 14 (quoting Morse, 132 F.3d at 910), the District Court was incorrect to conclude that the fourth prong of Kniepp was not satisfied. We disagree.

In effect, plaintiff argues that by arriving at the Henderson home, the defendant officers exercised their authority and placed Salim Henderson in a dangerous situation. Plaintiff has not identified, and we have not found, a single case in which a court has found an exercise of police authority merely because the police responded to a citizen's request for help. As discussed in Morse, "the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable... ." 132 F.3d at 915. Here, the defendant officers did nothing to place Salim Henderson in a dangerous position. The defendant officers did not "use their authority [as police officers] to create an opportunity that otherwise would not

have existed" for Henderson to harm himself Kneipp, 95 F.3d at 1208. In fact, the heart of the plaintiff's allegation asserts the opposite-the police failed to exercise their authority as police officers to place Salim Henderson in custody as soon as they arrived at the Henderson home.

Although we have suggested that inaction by government actors can be the basis for liability under section 1983, see Morse, 132 F.3d at 915, in the cases in which we have found liability, inaction has been preceded by a deliberate exercise of authority. In for example, we found the defendant officers potentially liable for leaving Mrs. Kneipp to find her own way home, but predicated that on their having acted to separate her from any private source of assistance. See Kneipp, 95 F.3d at 1210 ("The affirmative acts of the police officers here created a dangerous situation, requiring that they take additional measures to ensure [Kneipp's] safety."). Here, there is no allegation the defendant officers separated Salim Henderson from his private source of

assistance nor did anything more than respond to Mrs. Henderson's call.

The District Court was correct in concluding the fourth Kniepp prong was not satisfied and that the plaintiff could not establish a constitutional injury under the state--created danger exception to DeShaney.

C.

Because the plaintiff has failed to allege a constitutional violation, we need not reach whether the defendant officers are entitled to qualified immunity. See Miller, 174 F.3d at 376 at n.6 ("Because we determine that Appellants' argument on appeal does not assert a valid claim of a constitutional violation, we do not reach the issue of qualified immunity.").

The absence of a constitutional violation also resolves the question of municipal liability.

Although it is undoubtedly true that a municipality's "liability under section 1983 for a substantive due process violation

does not depend upon the liability of any police officer," Fagan, 22 F.3d at 1293, it is equally true that a Section 1983 claim requires a constitutional violation. Heller, 475 U.S. at 799. As there is no constitutional violation, there is no municipal liability.

IV.

For the foregoing reasons, we will affirm the District Court's granting of summary judgment for the defendants.

TO THE CLERK:

Please file the foregoing opinion.

Anthony J. Scirica
Circuit Judge